MONTANA
Management View

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Alternative pay efforts with unionized employees require special consideration

Managers exploring alternative pay for their employees should be aware of the role and rights of unions in negotiating pay. Most of us are familiar with some common collective bargaining procedures, such as contract negotiations or a grievance. But some managers have been surprised by the fact we have to negotiate alternative pay plans with unions prior to implementation.

As more agencies pursue alternative pay plans, more managers are raising good questions about union involvement. Taking the time now to address these questions could prevent complications or frustrations down the line:

The fact that alternative pay plans are a significant deviation from the traditional classified pay plan triggers the obligation to bargain.

Why do we negotiate with unions over alternative pay plans? The collective bargaining laws enacted by the Montana Legislature require public employers to bargain with union representatives over pay, hours and certain other conditions of work. These laws are administered and enforced by the Department of Labor and Industry. The fact that alternative pay plans are a significant

Highlights

deviation from the traditional classified pay plan triggers the obligation to bargain the proposed changes.

If union agents are employees' bargaining representatives, who is management's representative? Management's spokesperson for collective bargaining is the chief of the Labor Relations Bureau in the Department of Administration (39-31-301 MCA and governor's Executive Order No. 1-93). Bureau negotiators serve as an extension to your agency's human resource functions to help achieve your management goals and objectives in a collective bargaining environment.

How do we begin the appropriate discussions with the union about alternative pay? At the point you're interested in proposing or exploring new pay options in a unionized workplace, your agency should contact your representative in the Labor Relations Bureau. We will work with your human resource professionals and managers to help develop a management proposal and a bargaining plan. Labor relations staff will contact the union representative at the appropriate time and help coordinate the necessary labor-management communications.

What if we hire an outside consultant to help develop competencies and alternative pay components – is the process any different? The process is the same – contact the Labor Relations Bureau at the point management starts developing pay proposals in a unionized work environment. Consultants can help agencies identify employee competencies and improve performance appraisal tools, but they can't negotiate with unions. An agency can't implement an alternative pay plan until the state bargains the subject with union officials. The Labor Relations Bureau is the only authorized bargaining agent for state management.

What aspects of "alternative pay" are negotiable in a unionized workplace? All aspects of pay are negotiable, meaning, they are mandatory subjects of bargaining under state law. Pay ranges for each job, including market rates, minimum rates and maximum rates must be addressed through collective bargaining. Either labor or management can propose a market rate, and both sides are obligated to consider counterproposals in good faith. The selection and application of all pay components available in the broadband system are negotiable (e.g., market-based pay, competency-based pay, results-based pay, situational pay, strategic pay, etc.).

Are performance appraisal tools subject to bargaining? If management wants to link pay to performance, be prepared to bargain the appraisal tool and procedure. Traditionally management could revise the performance appraisal tool without unions showing much interest, because the appraisal did not affect pay. But performance standards that determine pay could very well constitute the type of pay standards and criteria that would be deemed "mandatory subjects of

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bargaining." Refusing to bargain a mandatory subject constitutes an illegal unfair labor practice (ULP). It could trigger a ULP charge, investigation, hearing, and order from the Department of Labor and Industry to "cease and desist" from the action that triggered the charge. It's best to avoid such lengthy, costly and disruptive disputes. Bargaining the performance appraisal tool and procedure doesn't mean management must build the tool by negotiating it step-by-step with the union. It simply means we must be prepared to present the tool at the bargaining table and consider any feedback or counter-proposals the union might submit in response. Failure to reach agreement on the tool, however, could preclude management from paying employees for competencies or performance.

Do unions categorically oppose pay that's tied to employee performance, or other types of alternative pay? Some unions have been supportive of competency-based efforts and other types of alternative pay. The majority of actual pay results achieved in the state's pilot projects, including competency-based pay, have occurred in unionized workplaces. Unions base their positions on the desire of each bargaining unit. If a majority of unit are reluctant to pursue certain pay changes, the union's position on pay issues for that unit is likely to reflect the majority sentiment.

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How much of state government's work force is unionized? State government's executive branch agencies (excluding the University System) are about 65 percent unionized. The percentage is even higher (probably greater than 90 percent) adjusting for the fact that managers, supervisors and certain other employees are not eligible to form unions.

Are we unique or unusual in the fact we have to bargain alternative pay plans with unions? No. All of Montana's public employers are subject to the same requirements. Moreover, private-sector employers nationwide have virtually the same bargaining obligations with unions under federal law that Montana's public employers have under state law. The American Compensation Association (ACA) calls the presence or absence of a union one of the most important factors in planning for alternative pay. In a national journal the ACA advises employers: *"Management must carefully design reward systems that are likely to be acceptable to a union. Understanding* ***how union members view alternative rewards*** *and* ***how collective bargaining laws operate*** *is necessary to design, administer and use alternative reward strategies to improve organizational effectiveness."*

How do union members view alternative rewards? There is no universal union "position" on alternative pay, but some concerns seem to recur throughout our pay explorations in state government. Two questions seem almost inevitable before labor and management will agree on a new pay plan. First, labor will want to know whether management can guarantee that all employees in the "new" pay plan will receive, at a minimum, the same raises that other employees in the "old" plan stand to receive. Second, labor will want to know how employees can appeal or grieve a pay

decision in the new plan. The more management can give on the first issue, the more the union will probably give on the second issue. Proposals are much more palatable for unions and employees when they have less to lose by exploring new pay. Your labor negotiator in the Labor Relations Bureau will provide some options for proposals to exempt individual pay decisions from the union contract's final and binding arbitration provision.

How do collective bargaining laws operate? Employees select union representatives as their exclusive legal agent to represent them on matters of wages, hours, fringe benefits and other conditions of employment. Management's bargaining team and the union's bargaining team must meet and negotiate "in good faith" in efforts to reach agreement. Both parties may submit proposals and counterproposals. Neither party is required to agree to the other party's proposal or to make a concession, but both parties have a mutual interest in reaching agreement. Under certain conditions, management may have a right to implement its "last, best and final offer," however, unions at the same time may have a right to engage in concerted activity such as a strike. These ultimate rights that both management and labor may exercise in the absence of a negotiated agreement serve as incentives for both sides to reach an agreement.

Aside from the legal duty to bargain, is there any benefit from union involvement in the development of an alternative pay plan? Most experts agree that a new pay system works best when employees have a substantial role in its development. They view the benefits of employee buy-in and ownership in the new system as highly desirable. In a unionized environment, employee involvement eventually takes the form of a union bargaining team and management bargaining team sitting down together to negotiate the details of an alternative pay system. Union involvement is indeed "the law," but it's also a good idea if the reality is you are in a work place that has already organized a union. Employees and unions are more likely to accept new ideas for alternative pay if they have a role in developing them.

Sustaining disciplinary action through arbitration – What does it take?

Prove it. That's the gauntlet thrown at managers when employee discipline is challenged. Sometimes managers are surprised to find that discipline arbitration hearings are more often about them than the disciplined employee. That's because management generally has the burden of proof in the arbitration of discipline cases, especially when the collective bargaining agreement requires "just cause" for discipline.

Managers and personnel officers who conduct disciplinary investigations probably have an interest in knowing how arbitrators view the concepts of "proof" and "investigation." Arbitrators have a lot of discretion to apply their own individual standards, but they consistently require that an adequate investigation precede employee discipline.

Arbitrators are concerned with two areas of proof. The first involves proof of wrongdoing. The second, assuming the employee's fault has been established, concerns the appropriateness of the particular discipline imposed. The necessary degree of proof can vary with the severity of the alleged offense, the evidence available, and the individual arbitrator.

Arbitrators generally do not require investigations to be faultless or perfect. They want to know the investigation was a committed effort to ascertain all the relevant facts. The investigator in a potential disciplinary situation need not be a professional investigator or private detective. But he or she must conduct the investigation in a manner that will be viewed as fair, thorough and impartial.

As employers, we must show in arbitration we carefully considered whether allegations against employees were supported by the facts. We must show (where appropriate) we interviewed witnesses and recorded statements. We must show we initiated a careful and sufficient investigation to ensure "both" or "all" sides of the story were fairly presented to (and considered by) the management decision-makers. We must also show we judged the facts instead of personality factors and unfounded assumptions. We must show we knew and considered the employee's motives and reasons for the violation of rules before we took disciplinary action. Then, we must demonstrate that the penalty was adjusted to the facts, whether the employee's action was in good faith, partially justified, or totally unjustified.

The most widely accepted standard in arbitration for analyzing "just cause" for employee discipline is the seven-step test established by Arbitrator Carroll Daugherty in his 1966 *Enterprise Wire Co.* decision. The seven steps could be described as:

1. Did the Employer give the employee advance **notice** of the possible or probable disciplinary consequences of the employee's conduct?
2. Did management make **reasonable rules**, or a reasonable order, in relation to the employer's business needs and acceptable employee conduct or performance?
3. Did the employer, before administering discipline, conduct an **investigation** of whether the employee in fact violated a rule or order?
4. Did the employer conduct a ***fair* investigation** objectively and impartially?
5. Did the investigation find substantial evidence of **proof** that the employee was guilty as charged?
6. Has the employer applied its rules, orders and penalties evenhandedly with **consistency**, without discrimination, to all employees?
7. Was the degree of discipline administered by the employer reasonably related to the seriousness of the employee's proven offense and the overall work record of the employee in service to the employer? In other words, **"did the penalty fit the crime?"**

Arbitrator Daugherty attached the following notes in his landmark decision related to investigations (paraphrased):

- The investigation stage of employee discipline presents the employee with his "day in court." The employee has a right to know of the allegations against him/her and deserves an opportunity to defend him/herself.

- The investigation must be completed before the disciplinary decision is made. In a certain aspect, the employer's judge (the decision-maker) is obligated to conduct him/herself somewhat similar to a court considering all the facts and circumstances. The arbitrator will evaluate the employer's actions as much or more than the employee's misconduct.

- It is appropriate to suspend an employee to remove him/her from the workplace when immediate action is necessary pending completion of the investigatory process. The investigation, however, should not be unduly delayed lest memories fade, evidence evaporates and positions harden into unreasonable behavior.

- The investigator may also be the judge, but neither the investigator nor the judge should be a witness against the employee.

- It is best if some higher "detached" management official performs the role of judge.

- The evidence must be substantial and convincing. Circumstantial evidence may be compelling and should not be overlooked. Expect the union advocate to exploit every weak link in your evidentiary chain of proof. Be careful about overlooking "missing links."

- Management should be aggressive in its search for truth. The arbitrator will expect the employer to show that there was an active and ambitious hunt for witnesses and evidence, going well beyond what participants reveal or volunteers disclose.

- The arbitrator will not be able to resolve conflicting testimony from witnesses at the hearing. Instead, the arbitrator will probably base his/her decision on how well management evaluated and addressed those disparities.

The investigator should know and understand what the union contract says (if anything) about investigations or disciplinary meetings. The investigator should be familiar with employees' ***Weingarten rights*** (union representation during investigative meetings; see: http://discoveringmontana.com/doa/spd/labor/weingartenrights.htm). If the charges involve criminal conduct, the public employer should coordinate its efforts with the appropriate law enforcement agency, recognizing employees' *Garrity* rights. (A *Garrity* hearing is an investigative interview allowing the employee to answer questions with the knowledge that any statements will not be used against him/her in criminal proceedings.)

If management arranges for an "outside" investigator, management should ensure the investigator fully understands and appreciates the employer's interests, the employee's

rights and the applicable standards. There may be similarities between law enforcement detective work and the investigation of employee misconduct, but employers and prosecuting attorneys have very different interests when considering employee conduct that may also constitute criminal activity. Sometimes employees become the subject of criminal investigations or criminal charges for alleged off-duty or on-duty misconduct. The employer's administration of employee discipline should not become dependent upon action by law enforcement or the criminal justice system. The employer's decision to discipline should be based upon *the employer's* investigation and disciplinary considerations. Criminal justice outcomes and sound employment discipline are distinguished from each other by factors such as prosecutorial discretion, plea bargains, disparate procedures, and the inherent difference between standards for incarceration versus employee discipline.

Managers should assume the quality of the investigation will be challenged in arbitration. Management representatives should expect to be cross-examined about the specifics and particulars leading to the disciplinary action. Many arbitrators will overturn management's decision to discipline an employee if there is evidence the investigation was inadequate or biased. ///

Witness Testimony

The most important evidence in a discipline case is usually testimony from witnesses who can speak first-hand to the facts that led to the employer's decision to discipline the employee. Arbitrators consider a number of factors in weighing the credibility of management and unit witnesses:

- Conflict or contradiction in the evidence.
- Inconsistency in the testimony of the accused employee and other witnesses.
- The source of the testimony – whether it's first-hand knowledge or merely hearsay and gossip.
- The demeanor of the witness – the arbitrator may credit or discredit the testimony according to his or her own impressions of whether the witness sounds or seems to be telling the truth.

Arbitrators use some or all of the following criteria to judge the credibility of witnesses:

- The relative strength of their recollections.
- The consistency in testimony given on the same subject at different times.
- The showing of obvious bias or prejudice.
- The showing of emotional stress or other feelings that would impair ability to respond to questions carefully and accurately.
- Evasiveness.
- The quality and reasonableness of testimony.
- The existence of corroborating testimony.

"Train the trainer" and "effective facilitation" picked as priorities for labor-management training funds

The Labor Relations Bureau will soon schedule training opportunities for state managers and unionized employees, using the recommendations of a five-member committee of personnel officers and union representatives. That committee identified "train the trainer" and "effective facilitation skills" as top spending priorities for the $150,000 appropriation (see **www.discoveringmontana.com/doa/spd/Labor/Newsletter2July2001.doc** for related article). Members recommended that participating state managers, bargaining unit employees, and advocates learn and understand effective methods for training adults, problem-solving, and the basics of successful labor-management committees, so they can then provide similar training to other managers and employees within their agencies. The Labor Relations Bureau will host a one- to two-day workshop in a central location sometime before March 2002.

The committee also recommended that money be allotted for individual agency requests and that key unionized employees be allowed to attend a joint conference for public employees scheduled for May 4 and 5, 2002, in Missoula, and hosted by the Montana Public Employees Association (MPEA) and MEA-MFT.

For more information about the labor-management training initiative, contact Stacy Cummings at **stcummings@state.mt.us**.

Arbitration roundup

Each arbitration case involves specific bargaining histories, contract language and facts that could be unique to the agency involved. Contact your labor negotiator in the Labor Relations Bureau if you have questions about how similar circumstances might apply to language in your agency's collective bargaining agreement.

Hiring records and materials are not "confidential" in grievance arbitration; must be provided to the union -

How much information must we release in a hiring grievance? Are the hiring files confidential? Do we have to release *all* the materials upon the union's demand? These are good questions. An arbitrator recently provided answers for a state agency involved in a contract grievance. The arbitrator's order was consistent with previous arbitral precedent and collective bargaining case law.

Here's what happened:

Two employees applied for an advertised position. The job was in the bargaining unit classified at grade 16 – a promotional opportunity for both employees. The two were the only applicants for the job. The collective bargaining agreement said when filling a vacancy, "where qualifications are substantially equal, seniority will be used as a tiebreaker." The applicants completed state applications, provided written answers to supplemental questions, and went through a structured interview procedure with job-related questions and answers. Management promoted the individual who performed the best in the competitive selection process. This employee happened to have less seniority than the unsuccessful applicant. The union grieved the hiring decision, alleging the less-senior employee was unqualified for the job and the more-senior employee should be awarded the promotion.

In the grievance procedure, the union requested copies of the job applications, supplemental questions and answers, interview questions and answers, and notes kept by members of the hiring team. Management refused to provide copies *of the successful applicant's* hiring materials unless the union would agree to withhold those materials *from the grievant*. Management cited part of the MOM Recruitment and Selection Policy No. 3-0165 (Section 2.21.3728) as the reason for the refusal: *"All application and selection materials shall be confidential. A department may not release personal information relating to any applicant to any person not involved in administering the hiring process. Materials relating to selection decisions may be released by the department or other parties upon the receipt of a properly executed administrative or judicial order."*

Despite the policy's "confidential" reference, Arbitrator Gordon Byrholdt ordered the state agency to provide the materials to the union as the union requested, without any strings attached. *"While it is true the State offered to let the Union's representative see the information requested, it conditioned its disclosure on an assurance from the Union that the Grievant would not be permitted to examine the material (relating to the successful applicant),"* Byrholdt said in his ruling issued in June. *"Such a condition is clearly wrong. It is an attempt by the State Agency to dictate how the union will carry out its role in representing its grieving member and evaluating the case. A unilaterally promulgated manual (the Montana Operations Manual) cannot overcome the bilateral responsibilities, rights and duties the parties' collective bargaining agreement confers on the signators. The State and its appropriate department is hereby ordered to turn over the requested documents to the Union without condition."*

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The state agency complied with the ruling immediately, a couple days before the grievance went to hearing. Byrholdt has not yet issued a decision on the merits of the grievance (the question of whether management violated the contract in selecting the successful applicant over the grievant). The state and the union were expecting a decision to arrive any day at the time this edition of *Management View* "went to press."

Byrholdt's ruling was not inconsistent with other sections of the MOM policy, which states*: "This policy shall be followed unless it conflicts with negotiated labor contracts or specific statutes, which shall take precedence to the extent applicable (Section 2.21.375)."* The state collective bargaining statute and applicable case law requires an employer to furnish a union with information necessary for the union to "police and enforce" the provisions of the collective bargaining agreement. In a hiring grievance, this information includes the hiring materials. The union was not interested in "personal information" about the job applicants. The union was only interested in the hiring standards that management established, administered and evaluated for all applicants in the selection procedure.

Should a state agency wait until an arbitrator orders the agency to turn over the materials to the union? From a labor relations perspective, the answer is "no." Arbitrators want to see that management has provided the union all the necessary information from the start (in the interest of resolving grievances at their lowest level) instead of waiting until the arbitration hearing. Interestingly, Arbitrator Ronald Hoh of Sacramento, California, raised this issue again recently at the Montana Labor Relations Conference in Bozeman on Sept. 26-27. Hoh presented a "Top 10" list of mistakes that parties make which can adversely affect their case in arbitration. Included on the list was *refusing or waiting to release necessary information in the grievance process until being ordered to do so*.

What's the lesson? As far as the MOM policy on recruitment and selection is concerned, consider the union to be one of the parties "involved in administering the hiring process" if the union contract contains a recruitment and selection provision. Therefore, a department should be prepared to release hiring information to the union in a hiring grievance. ⫽

Questions, comments or suggestions? Contact the Labor Relations Bureau or visit our website: www.discoveringmontana.com/doa/spd/index.htm

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